Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

HONEYVILLE GRAIN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts of this country should permit, tolerate, and encourage appeals to religious prejudice during union organizing campaigns, when to do so conflicts with a clear rule of federal law, as well as with decisions of other circuit courts of appeals?

CORPORATE DISCLOSURE STATEMENT

Petitioner Honeyville Grain, Inc. has no parent corporation, and there is no publicly held company that owns any of its stock.

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Petitioner Honeyville Grain, Inc. ("Honeyville") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 444 F.3d 1269 (10th Cir. 2006). The opinion is reproduced in the Appendix at App. 1a. The Decision and Order of the National Labor Relations Board ("Board") which the Tenth Circuit reviewed, is reported at 342 NLRB No. 61 (2004), and is reproduced at App. 26a. The Board's Decision and Certification of Representative, upon which the Board's Decision and Order was based, is not reported, but is reproduced at App. 35a.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 2006. A timely petition for rehearing *en banc* was denied on July 6, 2006. See, App. 47a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

None.

STATEMENT

Petitioner seeks review of the ruling of the Tenth Circuit Court of Appeals which held that where appeals to religious prejudice are made during a union organizing

campaign, the initial burden is on the party challenging the results of the election to prove that the religious statements were inflammatory, and only if that burden is met, is the party making the religious statements required to prove that the statements were actually relevant to any issue in the campaign.

Petitioner seeks review of the Tenth Circuit's ruling because it is in conflict with the rulings of other circuit courts of appeals on the same important matter, particularly *NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981), *NLRB v. Katz*, 701 F.2d 703 (7th Cir.1983), *NLRB v. Schapiro & Whitehouse, Inc.*, 356 F.2d 675 (4th Cir., 1966), and others. It is also in conflict with a clear rule of federal law enunciated by the Board in *Sewell Mfg. Co.*, 138 NLRB 66 (1962)

Petitioner also seeks review of the Tenth Circuit's ruling because the issue is an important question of federal law which has not been, but should be, addressed by this Court.

The basis of the jurisdiction of the Tenth Circuit Court of Appeals is the National Labor Relations Act, and more specifically 29 U.S.C. § 159(c), and 29 U.S.C. § 160(e) and (f).

This case arises out of a union organizing campaign. Five days before a union representation election, in a meeting called by the Union, held at the Union Hall, with 20-25 members of a 32-employee bargaining unit present, several Union representatives gratuitously injected religion into the campaign, by repeatedly referring to the owners and managers of petitioner Honeyville as "Mormons," saying that the

profits of the company are being given to Mormons, the company is giving its money to the Mormon Church, Mormons are missionaries, Mormons also give their money to Mormon missionaries, and Mormons speak good Spanish. These comments were immediately followed by an outburst of applause by all present. This was the last meeting before the election.

These religious references were not related to any issue in the campaign. The Union's goal was to deliberately brand Honeyville's owners as Mormons to serve only one purpose - to appeal to religious antipathy, and inflame the employees' religious prejudice against Honeyville in deciding for whom to vote.

The Union's strategy worked - it won the election by a vote of 23-7. A switch of just eight votes would have changed the result. Since there were 20-25 members present at the Union meeting, the repeated religious references clearly had a tendency to influence the election. Since the employees burst into applause immediately after the repeated religious comments were made, there is no doubt but that their religious antipathy was inflamed.

Honeyville objected to this conduct. A Board hearing officer recommended that the objections be overruled. The Board adopted this recommendation, certified the Union, and ordered Honeyville to bargain. See App. 35a. In order to test the propriety of the Board's certification, as was its right, Honeyville refused to bargain. The Board then filed an unfair labor practice charge against Honeyville, obtained summary judgment, and again ordered Honeyville to bargain with the Union. See App. 26a. Honeyville again exercised its right to

refuse to bargain, and petitioned the Tenth Circuit Court of Appeals for review of the Board's order.

By a 2-1 decision, filed April 27, 2006, see App. 1a, the Tenth Circuit denied the petition for review, thus enforcing the Board's order. The Tenth Circuit's decision cut the heart out of a rule of federal law regarding union organizing campaigns. That rule was enunciated by the Board in *Sewell Mfg. Co.*, 138 NLRB 66 (1962). In that case the Board stated that appeals to racial prejudice have no place in union organizing campaigns. The case established the rule that the burden will be on the party making use of a racial message to establish that it was germane to the issues. If the racial message is not germane, it is not permitted, because then the only purpose of injecting race into the election is to exacerbate racial prejudice and to create an atmosphere of hostility. The Board held that such appeals to racial prejudice will not be tolerated, and that an election so infected must be set aside, and a new election held. *Id.* at 71-72.

This rule is not limited to racial prejudice. It has been applied by the Board and the courts numerous times to efforts to incite religious prejudice as well. *See, e.g., NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981).

However, the Tenth Circuit put the proverbial cart before the horse. It held that the initial burden was on the target of the religious comments to prove that they were inflammatory. It further held that the Board need **never** consider the question of whether the message was germane to the issues, if the target does not first carry its burden to show the religious comments were inflammatory. This holding directly contradicts the rule

laid down by *Sewell*, because it forecloses consideration of germaneness. *Sewell* makes it clear that germaneness **must** be considered, because regardless of whether the religious message is inflammatory, if it is not germane it is not permitted. Under the *Sewell* rule, in order to be permitted, the religious message must be both germane, and not inflammatory.

Honeyville petitioned the Tenth Circuit for a rehearing *en banc*, and that petition was denied by a decision dated July 6, 2006.

REASONS FOR GRANTING THE PETITION

A. The Decision in the Court Below Creates a Split Between the Circuits.

The Tenth Circuit's decision creates a direct conflict with the decisions of at least four other circuit courts of appeals, which require that a racial or religious message be germane to the issues in the campaign, and that the party making use of the religious or racial message has the burden to establish that it is germane. If the message is not germane, these courts conclude that its purpose could only be to inflame racial or religious antipathy, a purpose that will not be permitted.

Prior to the Tenth Circuit's ruling, the Third Circuit Court of Appeals, in *NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53 (3d Cir. 1981), focused on the germaneness issue. In *Silverman's*, at a meeting six days before the election, attended by approximately 20 employees in a bargaining unit of 56 employees, a union officer called the company vice president a "stingy Jew." *Id.* at 57. The union won the election 29 to 23. *Id.* at 54.

While the procedural posture of the case was different (no Board hearing had been held) the comments of the Third Circuit Court of Appeals directly apply, as follows:

> "In making a remark such as the one involved here, a party does not simply set forth another party's position on matters of racial interest. Indeed, the remark, rather than identifying any position of the employer, can typically serve only to spotlight the minority religion of the Company's principal. **Such a remark has no purpose except blatantly to exploit religious prejudices of the voters. . . . We can see no reason for the remark except to inflame and incite religious or racial tensions.** Thus, the Company has alleged **a remark that falls within the *Sewell* definition** and, **under the rule of that case, the burden of establishing the legitimacy of the remark shifted to the Union."** *Id.* at 58. (Emphasis added).

The Third Circuit sent the case back to the Board to conduct a hearing, and to require the union to establish that the "stingy Jew" remark was germane to an issue in the case.

In *NLRB v. Katz*, 701 F.2d 703 (7th Cir.1983), the Seventh Circuit Court of Appeals agreed with, and followed, the Third Circuit's decision in *Silverman's*. The Seventh Circuit held that religious remarks introduced into the organizing campaign on behalf of the union were impermissible, because they were not germane to any legitimate issue in the campaign. The Seventh Circuit stated that the principle underlying the *Sewell* rule was that " 'workers of one race should not be persuaded to

vote for or against a Union on the basis of invidious prejudice they might have against individuals of another race. [Citations omitted]' " *Id.* at 706.

In *NLRB v. Schapiro & Whitehouse, Inc.*, 356 F.2d 675 (4th Cir., 1966), the Fourth Circuit denied enforcement of a Board bargaining order, in a case where on two occasions shortly before the election, the union distributed campaign literature which urged the employees, most of whom were African-Americans, to consider and act upon race as a factor in the election. The Fourth Circuit focused on the *Sewell* requirement that the racial comments be germane, when it explained that the basis for its decision was that "[e]quality of race in privilege or economic opportunity was not presently an issue. That a majority of the employees were Negroes did not make it so. For the union to call upon racial pride or prejudice in the contest could 'have no purpose except to inflame the racial feelings of voters in the election.' " 356 F.2d at 679. [The interior quote is from *Sewell*, 138 NLRB at 71].

The Eleventh Circuit Court of Appeals also focused on whether the religious message was germane to an issue in the campaign. In *M & M Supermarkets v. NLRB*, 818 F.2d 1567 (11th Cir. 1987), the court concluded that any effort to inject religious or racial themes into a union organizing campaign in order to inflame emotions, and have voters focus on the irrelevant but highly prejudicial issue of religion, has no place in a union election, and that religious remarks should be presumed as intentionally designed to affect an election when they are not germane to an issue in the case.

All of these courts correctly concluded that the

Sewell rule requires that when a representation election is challenged on the grounds that a party made use of a religious message, there **must** be a determination as to whether the message is germane to the issues, and the burden to prove that is on the party making use of the religious message. When that burden is not carried, the election must be set aside.

By its decision to require the target of the religious message to prove the message was inflammatory, **or lose**, without an inquiry into whether the message was germane, the Tenth Circuit ignored the *Sewell* holding, and established a rule that can only serve to fan the flames of religious prejudice in union organizing campaigns.

In short, the decision of the Tenth Circuit Court of Appeals creates a serious circuit split.

B. Allowing a Party to Inject a Racial or Religious Message into Union Organizing Campaigns When the Message Is Not Germane to any Issue in the Campaign, Raises an Important Question of Federal Law Which Has Not Been, but Should Be, Addressed by this Court.

The holding of the Tenth Circuit is of exceptional importance, not just to unions and unionized employers, but also because of what it says about the willingness of the Board and the federal courts to accept religious prejudice in the workplace, in general. The Tenth Circuit itself described the religious references as **"inappropriate, unwarranted and unjustified**," 444 F.3d at 1279 (Emphasis added), and conceded that they are "**wholly inappropriate for any representative**

campaign." *Id.* at 1277 (Emphasis added). However, it refused to strike down the appeal to religious prejudice in this case, by ignoring the Board's rule that appeals to racial or religious prejudice **on matters unrelated to election issues** have no place in organizing campaigns, and will not be tolerated.

This Court has yet to decide a case involving racial or religious comments in a representation election. Petitioner believes that *Sewell*, and the better reasoned cases from the Third, Fourth, Seventh, and Eleventh Circuits, described above, provide the only rule to follow. To be sure, there are Board cases, and cases from other courts of appeals, that do not strictly follow the *Sewell* Rule. Many of those cases are distinguishable on the facts. Many others are misreadings of *Sewell*, and provide no clear workable standard. It has been said that *Sewell* "is often cited by the courts of appeals, as well as the Board, [but that they have] failed to provide a consistent guide in practice." *Discrimination and Unionization Elections: A Common Sense Approach to Sewell*, 52 Rutgers L. Rev. 1161 (2000).[1]

There is a very good reason why there must be findings that a religious message must be **both** germane, and not inflammatory. The unifying principle for virtually all of the cases is that when the purpose of the message is to appeal to prejudice, the message is not permitted. That is the Board's own rule, as expressed in

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[1] This law review article describes how the Board and some of the courts of appeals have enunciated different formulations of the *Sewell* Rule. Honeyville does not agree with the conclusion of the author of the article, but the article discusses in detail how varied the interpretations of *Sewell* have been.

Sewell. When the message is inflammatory, or when the message is not germane, there can be no other purpose but an appeal to invidious prejudice.

The Tenth Circuit ignored all of this. Rather than follow the rule that religious messages in union organizing campaigns will not be permitted to be used as a tool to encourage religious prejudice, the Tenth Circuit encourages the use of religious prejudice in the workplace. If this Court does not review this case, it will appear that this Court is not "mindful of our society's public intolerance of racial and religious discrimination as evidenced in our Civil Rights statutes." *M&M Supermarkets* at 1574. Allowing the Tenth Circuit's decision to stand is to turn back the clock to a time when religious and racial prejudice were ignored, and allowed to infect society at all levels.

This Court should require the Board to live up to the promise it made in *Sewell*, two years **before** passage by Congress of the most significant anti-discrimination law in more than 100 years, the Civil Rights Act of 1964. That promise was that the Board "does not intend to tolerate as 'electoral propaganda' appeals or arguments which can have no purpose except to influence the racial feelings of voters in elections." *Sewell*, 138 NLRB at 71.

Both the Board and the courts are ill-equipped to determine if racial or religious messages are sufficiently inflammatory so as to affect an election. One can never be sure of the impact of religious propaganda. Rather, when the comments are not germane to the issues, there can be no other purpose but to attempt to improperly inflame religious prejudice, a goal which should not be countenanced. See *Sewell*, *Silverman's*, and their

progeny. As explained by the court in *M&M Supermarkets, supra*, there is great **difficulty in detecting the subjective reaction of employees to religious propaganda**, describing it as an "expedition into the thought processes of the electorate, a journey that administrators and courts are ill-equipped to make." 818 F.2d at 1571. Given this difficulty, the Board and the courts should presume that the election was affected, because such propaganda "inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise." *Sewell*, 138 NLRB at 71.

Thus, the simple rule should be that the burden **is on the party making use of a racial or religious message to establish that it was germane, and that if that party cannot do so, the election will be set aside.** This is the *Sewell* rule. This is the rule that the above cases support. It is also the rule that sends the strongest message that racial and religious statements in a representation election used as a tool to inflame the passions of the electorate, will not be tolerated. As stated in *Representation Elections, Anti-Semitism and the National Labor Relations Board*, 5 Va.J.Soc. Pol'y & L. 341, 370 (1998):

> "Society cannot always reach the hearts and minds of [bigots]. Certainly, however, it can limit their role in labor representation elections. Where the employer or union is responsible for an ethnic slur, the solution is simple: it should suffer the automatic, per se invalidation of any election it wins. Such a flat, prophylactic rule would clarify the *Sewell* doctrine, reduce litigation, and send the

most potent message that [religious appeals] are intolerable."

Just as this country's anti-discrimination laws provide that employers may not lawfully make workplace decisions about their employees based upon the race or religion of those employees (See, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17), so should this Court adopt a simple, workable rule that prevents decisions from being made by either side in union representation elections, based upon racial or religious prejudice. Thus, this Court should adopt the holding of *Sewell*, as explicated in *Silverman's*, *Katz*, *Schapiro*, and *M&M Supermarkets*, and rule that **the burden is on the party making use of a racial or religious message to establish that it was germane, and that if that party cannot do so, the election will be set aside.** Applying that rule to the facts of this case requires that the election be set aside, and that a new election be ordered.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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(any footnotes trail end of each document)

Nos. 04-9577 & 04-9591

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HONEYVILLE GRAIN, INC.,
Petitioner/Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

April 27, 2006, Filed

JUDGES: Before KELLY, HENRY, and MURPHY, Circuit Judges. KELLY, Circuit Judge, dissenting.

OPINION BY: HENRY

OPINION: HENRY, Circuit Judge.

This case requires us to determine whether a majority vote for a representative union was actionably clouded by a sustained or inflammatory appeal to religious bias. We may set aside the certification of the election only if the National Labor Relations Board ("the Board") incorrectly applied the law or its findings are not supported by substantial evidence. 29 U.S.C. § 160(e); *NLRB v. Velocity Express, Inc.*, 434 F.3d 1198, 1201 (10th Cir. 2006). Consequently, the Board has "wide discretion" in judging the fairness of an election, and a party objecting to pre-election conduct bears a "heavy burden" to prove that there has been prejudice to an election's fairness. *M & M Supermarkets, Inc. v. NLRB*, 818 F.2d 1567, 1573 (11th Cir. 1987).

In this appeal, Honeyville Grain asks us to set aside an election in which its truck drivers at a California facility voted in favor of a union to represent them. Honeyville contends that the union's agents made inappropriate remarks at a union meeting, five days before the election, by referring to the religious beliefs of the company's owners in an attempt to inflame the drivers' religious prejudices. The Board certified the union as the exclusive bargaining agent of the employees, and Honeyville subsequently refused to bargain with the union. The Board later ordered Honeyville to cease and desist from refusing to bargain. In response, Honeyville petitions for review of the Board's order, and the Board cross-appeals to enforce the order. We exercise jurisdiction under 29 U.S.C. § 160(e) and (f). Based on our deferential standard of review, we deny Honeyville's petition for review and enforce the order of the Board.

I. BACKGROUND

Honeyville Grain is a Utah corporation with facilities in California and Utah. It processes and distributes food products, and it employs truck drivers to deliver its products. In February 2002, the Local 166 of the International Brotherhood of Teamsters, AFL-CIO ("the Union") petitioned the Board for an election in a unit of Honeyville's full-time and part-time truck drivers at the Rancho Cucamonga, California facility. "The Board not only conducts elections, but it also oversees the propaganda activities of the participants in the election to insure that the voters have the opportunity of exercising a reasoned, untrammeled choice for or against labor organizations seeking

representation rights." *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 69 (1962).

The Board conducted a secret-ballot election at Rancho Cucamonga on April 12, 2002. All thirty-two eligible voters cast ballots; twenty-three voted in favor of the Union, seven voted against the Union, and two ballots were challenged. Later that month, Honeyville filed ten objections to the election. Relevant to this appeal, Honeyville objected to comments made in a meeting held at the Union's office five days before the election; twenty to twenty-five of the drivers attended. Meeting attendees testified that two Union agents, Rene Torres and David Acosta, stated:

1. Honeyville is run by Mormons;

2. Honeyville is giving its money to the Mormon Church;

3. Companies have tax incentive to give profits to churches, which should be shared with the workers instead;

4. Honeyville's Mormon owners not only give their money to the Mormon Church, but they also give money to the Mormon missionaries; and

5. Mormons are missionaries, and missionaries speak good Spanish.

Rec. vol. III, at 38-39, 75-76, 149-151, 155-56, 174-76, 298-304, 308. Mr. Torres is a driver with Honeyville Grain, and Mr. Acosta is a business agent and organizer for the Teamsters Local 396. Mr. Acosta claimed that

he made no reference to missionaries or the Mormon Church at the meeting.

The most extensive testimony came from Enrique Erazo, a Honeyville driver who attended the meeting where the religious remarks were made. At a Board hearing, Mr. Erazo testified that Mr. Torres stated:

> [The drivers] have rights to benefits. So, the money the Company was making-was a rich Company and so, the money that the Company was making, they needed to share it with every worker and improve the benefits to workers.
>
> Since the Company was a Company run by Mormons, [the Union] said they would . . . see to it that they would make better contributions-they did to the church and they would also distribute or share that money with Missionaries going out of the country and because the money was tax deductible and that is why they would give part of that money to the Mormon Church, instead of giving it to-sharing it with the workers-the opportunity that they have in order to better their way of life.

Id. at 38-39.

Mr. Erazo further testified that the meeting attendees applauded after Mr. Torres discussed the distribution of the company's profits and referenced the religious beliefs of its owners. Neither party has put forward any evidence about the religious makeup of the unit employees. The religious remarks were made at one of about ten Union meetings held prior to the election.

A Regional Director of the Board investigated Honeyville's objections to the election and directed that a hearing be conducted as to nine of the objections. After the hearing, the Hearing Officer recommended that the Board overrule each of Honeyville's objections, including the objection about the religious remarks, and certify the Union. The Hearing Officer's Report stated:

> Within the context of the April 7th Union meeting, Acosta and Torres were agents of the Union to the extent that their statements were made to all the unit employees in the presence of Stephenson [the Union's business agent] and to the extent to which Stephenson failed to repudiate their statements. Nonetheless, here, [Honeyville] has not met its burden to show any religious comments were inflammatory in nature. In the context of trying to persuade the unit employees that they should improve their lot, the evidence supports that Torres stated to unit employees that if an organization contributes to a church, then that organization has less profits to share with its workers. He also said that companies have business incentives to reduce their taxes. Within the context of his statement reasonable inferences can be made that Torres was talking about Honeyville and the Mormon Church.
>
> Nonetheless, whether or not Torres's comments are true, the comments are not prejudicial to the extent that the employees would not be able to weigh the truth of the matter to reach their own conclusions. [Honeyville] put forth hearsay (or at

> least non-probative) evidence that many of the managers at Honeyville are Mormons, yet [Honeyville] did not put forth any evidence of the religions of the unit employees or any evidence concerning why the statements as alleged specifically appealed to religious prejudices that the unit employees may have had. Additionally, the statement that missionaries speak better Spanish than non-missionaries is equally lacking in inflammatory value, and [Honeyville] has failed to show how and/or if the statements would inhibit the employees in their ability to make an informed decision about how to vote and/or how to evaluate the comments of Torres.
>
> Furthermore, even if hypothetically, [Honeyville] had made a *prima facie* case that the statements were inflammatory, the Union witnesses have provided sufficient context to all the statements to show a non-inflammatory purpose for each and all of the statements.

Rec. vol. V, doc. 15, at 18 (Hearing Officer's Report and Recommendations, dated July 18, 2002) (hereinafter "Recommendations").

The Board adopted the Recommendations and certified the Union as the exclusive collective-bargaining representative for Honeyville's drivers at Rancho Cucamonga. *See id.*, doc. 18, at 8 (Decision and Certification of Representative, dated Feb. 6, 2004) (hereinafter "Certification").

After the Certification, Honeyville refused to bargain with the Union. The Union filed charges with the

Board. The Board's General Counsel then issued a complaint alleging that Honeyville had refused to bargain collectively with the Union, in violation of sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act"). *See* 29 U.S.C. § 158(a)(1) and (5). Honeyville filed an answer, reasserting its objections to the Certification, and the General Counsel subsequently filed for summary judgment. The Board granted the motion for summary judgment. Rec. vol. V, doc. 29 (Decision and Order, dated July 30, 2004). The Board concluded that Honeyville violated the Act by its admitted refusal to bargain with the Union, and it ordered Honeyville to cease and desist from interfering, restraining, or coercing employees in the exercise of their rights under the Act. *See* 29 U.S.C. § 157. The Board also required Honeyville to bargain on request with the Union as the exclusive representative of the drivers.

In response, Honeyville now petitions for review of the Board's Decision and Order, requesting that we set aside the election. The Board cross-appeals to enforce the Decision and Order. This court can review the Board's actions for the limited purpose of deciding whether to "enforce, modify[], or set[] aside in whole or in part the order of the Board." *Id.* § 159(d).

II. STANDARD OF REVIEW

We review the Board's refusal to set aside an election for an abuse of discretion. *NLRB v. DPM of Kan., Inc.*, 744 F.2d 83, 85-86 (10th Cir. 1984). This court reviews de novo the Board's conclusions of law. *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1253 (10th Cir. 2005). "We will grant enforcement of an NLRB order

when the agency has correctly applied the law and its findings are supported by substantial evidence in the record as a whole." *NLRB v. Interstate Builders, Inc.*, 351 F.3d 1020, 1027 (10th Cir. 2003); *see* 29 U.S.C. § 160(e) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."). The substantial-evidence test requires only "the degree [of evidence] that could satisfy a reasonable factfinder. Furthermore, if the Board has made a plausible inference from the evidence, we may not overturn its findings, although if deciding the case de novo we might have made contrary findings." *Webco Indus., Inc. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir. 2000) (internal citation and quotation marks omitted). "We do not re-weigh the evidence or second guess the NLRB's factual inferences." *Velocity Express*, 434 F.3d at 1201.

III. DISCUSSION

The parties agree that the seminal case describing when an appeal to racial or religious prejudice warrants overturning an election is *Sewell Manufacturing Co.*, 138 N.L.R.B. 66 (1982). The Board in *Sewell* set aside an election where a union had lost 985 to 331. Id. at 70. For four months, employers distributed anti-African-American propaganda materials focused on the union's support for the civil rights movement, including a photo (mailed two weeks before the election) of a white union official dancing with an African-American woman, together with a story about "race mixing." *Id.* at 66-68.

In *Sewell*, the Board described which types of racial

references are allowed and which types warrant setting aside an election. It stated:

> So long . . . as a party limits itself to truthfully setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

Id. at 71-72. Appeals to racial or religious prejudices constitute grounds for setting aside election results if "the challenged propaganda has lowered the standards of campaigning to the point where it may be said that *the uninhibited desires of the employees cannot be determined in an election.*" *Id.* at 70-71 (emphasis added). As discussed below, a party challenging an election bears the preliminary burden to prove that the remarks at issue were inflammatory or formed the theme of the campaign. If this burden is met, the party who allegedly made the remarks then must prove that they were germane.

Here, the Hearing Officer and the Board concluded that Honeyville bore an initial burden to prove that the remarks were inflammatory, but did not satisfy it. The Hearing Officer found that Honeyville "has not met its burden to show any religious comments that were inflammatory in nature." Recommendations at 18. The

Board similarly concluded that Honeyville had not met this initial burden: "Even if [Honeyville's] evidence were fully credited, [Honeyville] has failed to demonstrate that the [Union's] conduct amounted to a sustained inflammatory appeal or a systematic attempt to inject religious issues into the campaign." Certification at 8 (internal quotation marks omitted).

A. *The challenging party must first show that the remarks were inflammatory.*

We must initially determine if the Hearing Officer and Board correctly interpreted *Sewell* to place the preliminary burden of persuasion on Honeyville to demonstrate that the religious remarks were inflammatory or the core of the Union's campaign. This is an issue of first impression in our circuit. Honeyville asks us to adopt a per se rule that, in a representative election, the party making use of the religious message bears the initial burden to show that the message was germane to the issue; if that party cannot do so, the election should be set aside. Honeyville also maintains that a party making religious comments has the separate burden to prove the comments were not inflammatory. The company, however, cites no Board or appellate decision adopting such a rule, and likewise, we have found no authority for the proposition.

Instead, courts have followed a general burden-shifting regime that the Board described in its Certification, and we adopt such an approach here. *Sewell* and the appellate courts interpreting that decision require a party challenging a representative election first to demonstrate that the religious remarks were inflammatory or formed the core of the campaign. If

this burden is satisfied, the burden then shifts to the party making the remarks to prove that such comments were "truthful and germane," as *Sewell* explains. 138 N.L.R.B. at 72. Remarks not found to be inflammatory or the core or theme of the campaign are reviewed under standards applied to other types of misrepresentations. *See DPM of Kan.*, 744 F.2d at 86 ("adopting the rule that elections will not be set aside because of misleading campaign statements, absent the use of forged documents or the alteration of an official Board document in a manner suggesting that the Board favors one of the parties").

This framework accords with other circuits that have explicitly discussed a party's initial burden when challenging pre-election racial and religious remarks. *See, e.g., Case Farms of N.C., Inc. v. NLRB*, 128 F.3d 841, 845 (4th Cir. 1997) ("The Board has made clear in the cases following *Sewell* that appeals to race or ethnicity must be 'inflammatory' in order to violate the *Sewell* standard."); *KI (USA) Corp. v. NLRB*, 35 F.3d 256, 260 (6th Cir. 1994) ("When a party . . . establishes a prima facie case [of] an 'inflammatory appeal' to racial feelings, . . . then the burden shifts to the party using the racial appeal to show that its remarks were 'truthful and germane.'") (quoting *Sewell*, 138 N.L.R.B. at 71-72); *NLRB v. Silverman's Men's Wear*, Inc., 656 F.2d 53, 58 (3d Cir. 1981) (concluding that "the burden of establishing the legitimacy of the remark shifted to the Union" after determining the remark "falls within the *Sewell* definition" of being inflammatory); *Peerless of Am., Inc. v. NLRB*, 576 F.2d 119, 125 (7th Cir. 1978) ("If . . . racial or sexual remarks are injected into an election campaign but do not form the core or theme of the campaign as they did in *Sewell*, and if the remarks

are not inflammatory, they should be reviewed under the standards applied to other types of misrepresentation."), *overruled on other grounds by Mosey Mfg. Co. v. NLRB*, 701 F.2d 610 (1983); *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917, 925 (5th Cir. 1976) (stating that "the reversal of burden of persuasion [from the party challenging the election to the party who made the remarks] occurs if the racial remarks form the core or theme of the campaign, or if the statements are racially inflammatory") (internal quotation marks omitted).

Having determined that the Board correctly placed the preliminary burden of proof on Honeyville, we examine whether the Board had substantial evidence to conclude that the religious remarks were not inflammatory or the theme of the Union's campaign.

B. *Substantial evidence supported the Board's findings that the remarks were not inflammatory or the theme of the campaign.*

In *Sewell*, the Board was concerned with a party's "deliberate" attempt to "overstress and exacerbate racial feelings by irrelevant, inflammatory appeals," 138 N.L.R.B. at 72, but it did not define what constituted "inflammatory appeals." The Board did make it clear, however, that it works to conduct elections free from "elements which prevent or impede a reasoned choice," *id.* at 70, and it will not "tolerate as 'electoral propaganda' appeals or arguments which can have no purpose except to inflame the racial feelings of voters in [an] election," *id.* at 71. Furthermore, the Seventh Circuit has explained that "[a] statement is racially inflammatory on its face if it is intended to produce or

exploit strong racial prejudice, and is in fact likely to produce or exploit such racial prejudice." *State Bank of India v. NLRB*, 808 F.2d 526, 541 (7th Cir. 1986). These principles described by the Board and the Seventh Circuit apply similarly to inflammatory religious comments.

With this advice in mind, we look at the Board's findings about the Union's religious remarks:

> The Board in *Sewell* distinguished between sustained, deliberate, calculated appeals to racial prejudice (as in that case) and isolated, casual remarks appealing to prejudice. 138 N.L.R.B. at 70-72. Accordingly, since *Sewell*, the Board has consistently refused to overturn elections on the basis of comments with racial or religious overtones, even when they were inaccurate or gratuitous, when the comments were not inflammatory or part of a sustained, persistent attempt to appeal to the racial or religious prejudices of eligible voters.[1] Relevant to the inquiry are the context in which the statements are made, and the "total conduct" of the person making the comments. [*Id.*] at 72.
>
> Applying these principles, we adopt the hearing officer's conclusion that the [Union's] conduct here did not so lower the standards of campaigning that the uninhibited desires of the employees could not be determined in an election. We find that, even if the evidence were fully credited, [Honeyville] has failed to demonstrate that the [Union's] conduct amounted to a "sustained inflammatory appeal"

> or a "systematic attempt to inject religious issues into the campaign."
>
> Considering both the context and the [Union's] total conduct, we find that the [Union] did not overstress or exacerbate religious prejudice. The comments at issue were made at only one of about 10 union meetings. [Honeyville] offered no evidence that there was any other injection of religious comment into the campaign (through literature or other means); thus, religion was neither the core nor the theme of the campaign. Nor did [Honeyville] offer any evidence showing a history of preelection tension. Any appeal to religious prejudice-if, indeed, there was such an appeal-certainly does not appear to have been a deliberate and calculated attempt to so inflame religious prejudice that the employees would vote against [Honeyville] on religious grounds alone. In any event, we find that the [Union's] remarks would not have the "likely effect" of "preventing or impeding" employees from making a "reasoned choice" in the election. [*Id.*] at 70.
>
> In sum, because [Honeyville] failed to demonstrate that the [Union], through its preelection conduct, overstressed and exacerbated racial or religious feelings through a deliberate appeal to prejudice, its [objection] does not provide a basis for setting aside the election.

Certification at 6-8 (footnotes and certain citations omitted).

At the outset of our review, let us be clear: the Union agents' references to the religious belief of Honeyville's owners at this meeting were wholly inappropriate for any representative campaign, and in no way do we condone such remarks. Religious prejudice can work in subtle ways. We are *particularly* troubled by the testimony that the employees applauded after the Union representative's discussion of Honeyville's profits and incentives to contribute to the Mormon Church.

But we must also keep in mind that our case law accords considerable deference to the Board's factual findings, and our review here-of whether substantial evidence supports those findings-is "a narrow one." *Webco Indus.*, 217 F.3d at 1311. "The 'substantial evidence' test *itself* already gives the agency the benefit of the doubt, since it requires not the degree of evidence which satisfies the court that the requisite fact exists, but merely the degree that *could* satisfy a reasonable factfinder." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377, 118 S. Ct. 818, 139 L. Ed. 2d 797 (1998). Also, we must examine the allegedly inflammatory appeal in the context of the "totality of circumstances surrounding [the Union's] remarks." *Silverman's Men's Wear*, 656 F.2d at 60.

Based on our standard of review and the record considered as a whole, we conclude that substantial evidence supported the Board's findings that the pre-election remarks were not inflammatory and did not form the core or theme of the Union's campaign.

1. The religious remarks were not inflammatory.

Perhaps most importantly, the Union's religious comments did not explicitly disparage Mormons or reference the owners' religion in an overtly abusive or gratuitous manner. The remarks also did not employ vulgarity or profanity to signal that Honeyville's owners deserved particular disdain. *Cf. YKK (U.S.A.) Inc.*, 269 N.L.R.B. 82, 84 (1984) (setting aside an election because of a union's repeated references to the company's owners as "Japs" and "damn Japs," together with printed materials stating "Remember Pearl Harbor," "Japs Go Home," "Japs speak with forked tongue," and "slant eyes"); *Schneider Mills, Inc. v. NLRB*, 390 F.2d 375, 377, 379-80 (4th Cir. 1968) (finding inflammatory a union handbill, alleging that the company president wanted to burn to death two female union employees and further comparing the president's "filth" to Hitler). We can therefore distinguish the facts here from *Silverman's Men's Wear*, a Third Circuit case on which Honeyville primarily relies.

In *Silverman's*, a union officer allegedly called the company's vice-president a "stingy Jew" at a meeting attended by twenty of the fifty-six employees, six days before the election. 656 F.2d at 55. The court found "no reason for the remark except to inflame and incite religious or racial tensions," *id.* at 58, and labeled the one-time comment as a "bald, bigoted slur," *id.* at 59 n.10. The Third Circuit concluded that the alleged remark "[fell] within the *Sewell* definition" of being inflammatory "because of its sensitive nature," even though the alleged remark was not repeated. Id. at 58. The court remanded the case for a hearing to determine if the remark warranted a new election.[2]

The Board characterized the Union's religious remarks

here differently than the alleged "stingy Jew" comment in *Silverman's*. Pointing out the fact that Honeyville's owners are devout and give money to their church and its missionaries is substantively different than "the directly abusive remark alleged" in *Silverman's*. *Id.* at 59 n.10. Here, the Union agents sought to tie the comments to a relevant employee issue-how the company distributes its profits-and we do not believe the remarks incited religious tension in the same way as a racial or religious slur intended solely for inflammatory appeal. In short, the remarks regarding Honeyville's allocation of financial resources did not rise to the level of an abusive religious slur. *Cf. NLRB v. Katz*, 701 F.2d 703, 705-08 (7th Cir. 1983) (denying enforcement of a Board's petition where a Roman Catholic priest actively supporting a union's efforts referred to the company's owners as Jewish, discussed the movie "Holocaust," and stated that the Jewish owners are "getting rich while we're getting poor," during a union meeting at a Catholic church to a workforce comprised largely of Catholics).

Further, Honeyville has not shown how another alleged remark-that Mormons are sometimes missionaries, and missionaries speak good Spanish-appealed to the employees' religious prejudice. As we noted earlier, neither party has described to us the religious make-up of the unit employees. We only know that at least some (and maybe all) of the drivers spoke Spanish. The union agent making that remark, Mr. Torres, denied that his two references to missionaries during the meeting had negative connotations.

Also, notably, the Third Circuit's decision in *Silverman's* was in a different procedural posture. The

court there analyzed the Board's findings to determine if the objecting party presented evidence that "raised substantial and material factual issues, so as to require a hearing." 656 F.2d at 55. The Third Circuit concluded that the allegations met that burden and needed to be properly explored at a hearing. Here, Honeyville has already had the benefit of a hearing, and we only determine on appeal if substantial evidence supports the Board's findings in light of the hearing testimony and the record considered as a whole.

2. The religious remarks were not a central theme of the campaign.

Finally, the isolated remarks were clearly outside of the core issues of the Union's campaign and there was no evidence of pre-election religious tension, and Honeyville does not dispute the Board's findings as such. *See State Bank of India*, 808 F.2d at 542 (concluding that a union's isolated racial remark-about a company's efforts to keep depressed working conditions and low wages because most employees were of minority groups-was not "sufficiently close to the core theme of the campaign"); *NLRB v. Utell Int'l, Inc.*, 750 F.2d 177, 180 (2d Cir. 1984) (holding that "typical economic issues were the essential themes of the election campaign" and the false accusations of racism were non-inflammatory). As the Board noted here, the references to Honeyville's owners as Mormons occurred five days before the election, but at only one of about ten Union meetings organized during an extended campaign. *See Arlington Hotel Co. v. NLRB*, 712 F.2d 333, 338 (8th Cir. 1983) (determining that a union's one-time references to Hitler and slave ships in describing

the company's management did not have inflammatory effect and were not the campaign's central theme).

Further, Honeyville has not shown any pre-election religious "tension" between the company and its employees that may have been exacerbated by the isolated religious remarks. *Cf. NLRB v. Eurodrive, Inc.*, 724 F.2d 556, 559 (6th Cir. 1984) (concluding that a Board hearing was warranted when a union organizer's statement "concerning the white employees' need for protection" was "in itself, insufficient to establish any particular intent to exacerbate racial feelings among the employees," but the statement "placed an undue emphasis" on racial issues "in light of the pre-existing racial tension that existed at the time the alleged statements were made"). The Board specifically noted the absence of "any evidence showing a history of preelection tension" in its Certification, and contrasted Honeyville's election with campaigns involving "a history of preelection tension, [where] even an isolated reference to race or religion could constitute a sustained inflammatory appeal." Certification at 8 & n.5.

IV. CONCLUSION

The party challenging an election on the basis of pre-election religious comments must initially show that the remarks were either inflammatory or formed the core or theme of the campaign. Here, Honeyville did not satisfy this preliminary burden. While we in no way condone the inappropriate, unwarranted, and unjustified religious references, substantial evidence from the record considered as a whole supports the Board's conclusion that the comments were not

inflammatory or central to the Union's campaign. "If supported by substantial evidence, we must affirm the Board's conclusions *even though we might reach a different result were we reviewing the record de novo.*" *Pub. Serv. Co. of Colo. v. NLRB*, 405 F.3d 1071, 1077 (10th Cir. 2005) (quotation marks omitted) (emphasis added). The Board did not abuse its discretion when it declined Honeyville's request to set aside the election. Accordingly, we DENY Honeyville's petition for review, and we ENFORCE the order of the Board.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 In the Certification, the Board cited three unsuccessful challenges by an employer to set aside an election based on a union's alleged comments during a campaign. *See Catherine's Inc.*, 316 N.L.R.B. 186, 186, 189 (1995) (concluding that a union representative's comments-that the company's attorney was Jewish, "he has a Jewish law firm," and "Jewish people" "would sit down and negotiate a contract with you" if they lost-did not constitute a basis for setting aside the election "since they do not rise to the level of religious slurs, and were neither intended to nor had the effect of infecting the election atmosphere with religious prejudice or intolerance"); *Brightview Care Ctr.*, 292 N.L.R.B. 352, 352 & n.2 (1989) (determining that employees' alleged remarks-that "the owners would not give us raises because they were Jews and cheap" and "maybe Hitler did the right thing"-were "isolated remarks made by unidentified employees, apparently in the course of casual conversation among employees"); *Beatrice Grocery Prods., Inc.*, 287 N.L.R.B. 302, 303 (1987), *enforced*, 872 F.2d 1026 (6th Cir. 1989) (unpublished) (finding substantial evidence to support the Board's

conclusion that a union organizer's one-time comments to a mostly African-American workforce, in which he criticized the company's alleged racism and stated that the company had called the workers "dumb niggers," were neither the theme of the campaign nor intended to encourage racist attacks against particular ethnic groups).

The Board has similarly handled union challenges to a company's alleged racial remarks in a campaign. *See, e.g., Coca-Cola Bottling Co.*, 232 N.L.R.B. 717, 717-18 (1977) (certifying an election in which the union lost and had argued that a company supervisor stated to four African-American employees-out of 106 eligible voters-that a potential steward, if the union won the election, would be biased against African-American employees); *Allen-Morrison Sign Co.*, 138 N.L.R.B. 73, 74-75 (1962) (certifying an election in which the union lost after the company had sent letters to all employees explaining how the national union supported segregation, and noting that the employer's letter "was temperate in tone and advised the employees as to certain facts concerning union expenditures to help eliminate segregation").

n2 Following a hearing, the Board concluded that testimony of the employer's witnesses was "unreliable" to establish that the union representative made any racial or religious slur. *Silverman's Men's Wear*, 263 N.L.R.B. 191, 193 (1982).

DISSENT BY: KELLY

DISSENT: KELLY, Circuit Judge, dissenting.

Given the small number of eligible voters, this was a close election. In absolute numbers, it was far closer than *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962), where a 654 vote difference dictated the outcome. *Id.* at 66. A shift of just nine votes, given that two apparently were challenged, would have altered the result. Five days before the election, the union organizers were obviously trying to incite the employees to vote for the union. What better way than to point out that the owners or managers of the company were of a different faith and that the money they contributed to their church instead rightfully belonged to the workers? It is common knowledge that members of the LDS Church tithe.[1] With all due respect to the majority, religious bigotry is blatant in this case. The court's resolution, taking comfort in the apparent absence of overt abuse, vulgarity, or profanity in the union organizers' diatribe, simply misses the forest for the trees.

The court states, as it must, that the references to the religion of Honeyville's owners "were wholly inappropriate," not to be condoned, and particularly troubling given the employee applause that followed these comments. Although the court's holding is couched in deference, we need not defer to patently incorrect factual findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951) ("Congress has . . . made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial."). Ignoring the obvious, the ALJ and the NLRB held that the statements in question were not an attempt to inject religious issues into the campaign by appealing to religious prejudice against the company and its owners.

That conclusion is simply transparent. The only purpose of such comments was to mobilize the employees against their employer by suggesting that the employer preferred the religious interests of its owners over the welfare of its employees. See *NLRB v. Silverman's Men's Wear, Inc.*, 656 F.2d 53, 58 (3rd Cir. 1981) (noting that, as was the case here, the "remark, rather than identifying any position of the Employer . . . has no purpose except blatantly to exploit religious prejudices of the voters"). This more than adequately satisfies a prima facie case of inflammatory remarks sufficient to shift the burden to the union to prove the remarks were truthful and germane. Were there any doubt, one need only consider the balance of those remarks. *Id.* at 59 ("The allegations in the Company's objection raised a prima facie case that [the] religious slur did impermissibly infringe on the employees' freedom of choice.")

The union agents did not stop after slurring the Mormon church. The next target was real or imagined contributions to Mormon missionaries. Finally came the non-germane commentary on the ability of the stereotypical missionaries to speak "good Spanish," yet another reason to distrust the owners.[2] In my view, this case cannot be meaningfully distinguished from Silverman's. There, the Third Circuit held that a union official's referring to a company official as a "stingy Jew" required the union to meet the burden of establishing the legitimacy of the remark, an impossible burden. *Id.* at 58. Indeed, this court's attempts to distinguish Silverman's are not particularly availing. While it is true that Silverman's remanded for a hearing and our review is for substantial evidence, the Third Circuit made it clear that calling a company

official a "stingy Jew," regardless of the labor policies of the company, could not be legitimate; the issue on remand was whether the union could prove that the remark was harmless. *Silverman's*, 656 F.2d at 60.

This court also indicates that the Mormon discourse was an isolated incident, not the central theme of the union's campaign. That rings hollow when one considers the nature of the ten "meetings" between the union and the employees. Although Mr. Stephenson testified that ten meetings occurred, III R. at 421, the culmination of the union's campaign occurred at the April 7th formal meeting where all or virtually all of the drivers were present. Prior to that, all that occurred was a series of informal encounters between employee organizers and substantially less than all of the employees. These informal encounters are nowhere near the equivalent of the April 7th meeting or rally. As such, the court's conclusion that these statements were only an isolated incident bears no merit. Further, it strains credulity to suggest, as the court has, that under the "totality of the circumstances" these comments were not inflammatory, particularly given the employees' embracing the comments with applause. Id. at 39-40. The comments in this case came at a critical time in the organizing process, were reprehensible and had absolutely no proper purpose in the election. I dissent.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The comments also disparaged the company, Honeyville, Inc., based upon its alleged charitable contributions which were deductible for federal income tax purposes. A corporation may deduct charitable contributions from taxable income, subject to a

maximum of ten percent of such income. I.R.C. § 170(b)(2). No evidence in this record suggests that Honeyville made such contributions.

n2 Virtually all of the drivers spoke only Spanish. III R. Tr. at 36 (An employee, testifying through an interpreter, noted that "Mr. Raul . . . was the Interpreter for everybody because [Mr. Stephenson] does not speak Spanish and we do not speak English.").

Case 31-CA-26806

NATIONAL LABOR RELATIONS BOARD

Honeyville Grain, Inc. and Teamsters Chauffeurs, Warehousemen, Industrial & Allied Workers of America, Local 166, International Brotherhood of Teamsters, AFL-CIO

July 30, 2004

DECISION AND ORDER

By Robert J. Battista, Chairman; Wilma B. Liebman, Member; Peter C. Schaumber, Member

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

OPINION:

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on May 5, 2004, the General Counsel issued the complaint and amendment to complaint on May 14 and 21, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 31-RC-8075. (Official notice is taken of the "record" in the representation proceeding

as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel, 265 NLRB 343 (1982).)* The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On June 4, 2004, the General Counsel filed a Motion for Summary Judgment. On June 9, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its objections to the election in the representation proceeding.[1]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941).* Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Rancho Cucamonga, California (Respondent's facility), has been engaged in the business of manufacturing, distributing, and warehousing food grade products.

During the 12-month period ending May 5, 2004, the Respondent, in conducting its business operations described above, purchased and received at its Rancho Cucamonga, California facility goods valued in excess of $ 50,000 directly from points outside the State of California.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held April 12, 2002, the Union was certified on February 6, 2004, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> Included: Full-time and regular part-time drivers employed by Honeyville Grain, Inc. at or out of 11600 Dayton Drive, Rancho Cucamonga, California.

> Excluded: Quality assurance employees, warehouse employees, production employees, maintenance employees, mix room employees, office clerical employees, professional employees, all other employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On about February 20, 2004, the Union, by letter, requested the Respondent to bargain and, since about that same date, the Respondent has refused to do so. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after February 20, 2004, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962)*, enfd. *328 F.2d 600 (5th Cir. 1964)*, cert. denied *379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964)*, enfd. *350 F.2d 57 (10th Cir. 1965)*.

ORDER

The National Labor Relations Board orders that the Respondent, Honeyville Grain, Inc., Rancho Cucamonga, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Teamsters Chauffeurs, Warehousemen, Industrial & Allied Workers of America, Local 166, International Brotherhood of Teamsters, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

Included: Full-time and regular part-time drivers employed by Honeyville Grain, Inc. at or out of 11600 Dayton Drive, Rancho Cucamonga, California.

Excluded: Quality assurance employees, warehouse employees, production employees, maintenance employees, mix room employees, office clerical employees, professional employees, all other employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Rancho Cucamonga, California, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 20, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region

attesting to the steps that the Respondent has taken to comply.

Footnotes

n1 Although the Respondent's answer denies the complaint allegation that it has refused to bargain with the Union, we find that this denial does not raise any issues warranting a hearing. The Respondent's response to the Notice to Show Cause admits that it "did refuse to negotiate with the Union, on the grounds that it had no obligation to do so . . ." Thus, it is clear that the Respondent is refusing to bargain in order to contest the Union's certification.

In addition, in its response to the Notice to Show Cause and opposition to the Motion for Summary Judgment, the Respondent contends that the General Counsel's failure to attach a copy of the "Employer's Exceptions to the Hearing Officer's Report and Recommendations" and the "Employer's Brief in Support of Exceptions" is sufficient reason to deny the Motion for Summary Judgment because the motion is not supported by the record and the General Counsel has violated the requirements for filing such a motion. This assertion is without merit. The documents referred to were previously submitted to the Board and are part of the record in the representation proceeding below. As noted above, the Board has taken official notice of the record in that proceeding, and the failure of the General Counsel to attach these documents to its motion does not deprive the Board of a full record in this unfair labor practice proceeding.

n2 The Respondent's request that the complaint be dismissed is therefore denied.

n3 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Teamsters Chauffeurs, Warehousemen, Industrial & Allied Workers of America, Local 166, International Brotherhood of Teamsters, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> Included: Full-time and regular part-time drivers employed by us at or out of 11600 Dayton Drive, Rancho Cucamonga, California.
>
> Excluded: Quality assurance employees, warehouse employees, production employees, maintenance employees, mix room employees, office clerical employees, professional employees, all other employees, guards and supervisors as defined in the Act.

HONEYVILLE GRAIN, INC.

n1 Although the Respondent's answer denies the complaint allegation that it has refused to bargain with the Union, we find that this denial does not raise any issues warranting a hearing. The Respondent's response to the Notice to Show Cause admits that it "did refuse to negotiate with the Union, on the grounds that it had no obligation to do so . . ." Thus, it is clear that the Respondent is refusing to bargain in order to contest the Union's certification.

In addition, in its response to the Notice to Show Cause and opposition to the Motion for Summary Judgment, the Respondent contends

that the General Counsel's failure to attach a copy of the "Employer's Exceptions to the Hearing Officer's Report and Recommendations" and the "Employer's Brief in Support of Exceptions" is sufficient reason to deny the Motion for Summary Judgment because the motion is not supported by the record and the General Counsel has violated the requirements for filing such a motion. This assertion is without merit. The documents referred to were previously submitted to the Board and are part of the record in the representation proceeding below. As noted above, the Board has taken official notice of the record in that proceeding, and the failure of the General Counsel to attach these documents to its motion does not deprive the Board of a full record in this unfair labor practice proceeding.

Case 31-RC-8075
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HONEYVILLE GRAIN, INC.
Employer

and

TEAMSTERS CHAUFFEURS, WAREHOUSEMEN, INDUSTRIAL & ALLIED WORKERS of AMERICA, LOCAL 166, INTERNATIONAL BROTHERHOOD of TEAMSTERS, AFL-CIO
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a-three-member panel, has considered objections to an election held April 12, 2002, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 23 for and 7 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, adopts the hearing officer's findings[1] and recommendations, and finds that a certification of representative should issue.

The Employer's objections allege that the Petitioner's agents and employee supporters made a number of

threats, promises of benefits, and other statements to bargaining unit employees that impermissibly interfered with the election. The hearing officer recommended that each of the objections be overruled. For the following reasons, we agree with the hearing officer.

Objections 1, 2, and 3. The hearing officer Properly rejected the Employer's contention that the Petitioner threatened, intimidated, and coerced bargaining unit employees by telling them that they would be terminated or fined if they did not support the Petitioner, or fined if they did not sign authorization cards before the election. As the hearing officer found, the Petitioner's agents' statements that employees would lose their jobs in six months if they did not back up the Petitioner do not arrant getting aside the election, because the Petitioner did not have the power to carry out such a threat. Pacific Grains Porducts, 309 NLRB 690, 691 (1992); NLRB v. Cal-Western Transport, 870 F. 2d 1481, 1489 (9th Cir. 1989). The agents made no other threats of job loss; rather, they merely predicted that employees would have more job security and less chance of outsourcing with the Petitioner than without. Such statements, which stress the benefits of union representation in terms of job security, are not objectionable. NLRB v. Superior Coatings, Inc., 839 F.2d 1178, 1181 (6th Cir. 1988). Finally, the hearing officer discredited Employer witnesses' testimony that employee Silva told them that they would lose their jobs, or have to pay a $500 fine, if they did not sign a union card.[2]

Objections 4 and 5. Like the hearing officer, we find no merit in the Employer's contention that the Petitioner

coerced employees by promising them that the Petitioner would waive initiation fees, if they became union members or signed authorization cards before the election. According to the credited testimony, Petitioner representative Stephenson explained to employees that the Petitioner would waive initiation fees for all employees in the bargaining unit until the ratification of the first contract, so long as the employee. was in the unit prior to ratification, and regardless of whether the employee supported the Petitioner. Thus, the Petitioner's offer was not conditioned on supporting or joining the Petitioner and continued to be available after the election. It is well established that such promises are not objectionable. See, e.g., Lake Charles Memorial Hospital, 226 NLRB 849 fn. 1 (1976) ; NLRB v. Cal-Western Transport,supra, 870 F. 2d at 1487. [3]

Objection 6 . The Employer contends that the Petitioner impermissibly appealed to and inflamed religious prejudice and hatred. According to the credited testimony, the Petitioner's representatives made the following statement at a meeting attended by most of the unit employees, five days before the election: (a) the Employer is run by Mormons; the Employer is making profits; those profits are being given to Mormons; (2)sometimes Mormons are missionaries, and missionaries speak good Spanish and (3) companies have incentives to give profits to churches to reduce taxes; these profits should be shared with the workers instead. We agree with the hearing officer that those statements do not furnish grounds for setting aside the election.

The leading case describing the conditions under which

appeals to radical or or religious prejudice warrant overturning an election is Sewell Mfg. Co., 138 NLRB 66 (1962). There, the Board stated that "The ultimate consideration is whether the challenged propaganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot he determined in an election." Id. at 71. The Board announced the following election standard:

So long, therefore, as a party limits itself to truthfully setting forth another party's position on matters of racial interest and does not deliberately seek to overstress or exacerbate racial feeling by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him. Id. at 71-72.

Applying that standard, the Board invalidated the election, finding "from the kind and extent of propaganda material distributed that the Employer calculatedly embarked on a campagin so to inflame racial prejudice of its employees that they would reject the Petitioner out of hand on racial grounds alone." Id. The Board concluded that the employer's propaganda "so inflammed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility." Id.

Applying Sewell, the hearing officer here found that the

Employer had not shown that the Petitioner's religious comments were inflammatory, why the statements may have appealed to employees' religious prejudices, or how the statements inhibited employees' ability to vote. Accordingly, he found that the comments were not grounds for overturning the election.

In exceptions, the Employer argues that the hearing officer wrongfully placed the burden of proof on the Employer. Citing Sewell and NLRB v. Silverman's Men's Wear, Inc., 656 F.2d 53 (3rd Cir. 1981), the Employer argues that the burden is, on the party making the religious comment to establish that the comment was both germane and truthful. The Employer further argues that, under Silverman, the Petitioner was required to prove that the religious remark "was nevertheless harmless." According to the Employer, the hearing officer erred by failing to require the Petitioner to show either that the remarks were germane and truthful or that, they were harmless and had no impact on the election.

We find no merit in these arguments. The Board in Sewell, distinguished between sustained, deliberate, calculated appeals to racial prejudice (as in that case) and isolated, casual remarks appealing to prejudice. 138 NLRB at 70-72. Accordingly, since Sewell, the Board has consistently refused to overturn elections on the basis of comments with racial or religious' overtones, even when they were inaccurate or gratuitous, when the comments were not inflammatory or part of a sustained, persistent attempt to appeal to the racial or religious prejudices of eligible voters. See, e.g., Catherine's, Inc., 316 NLRB 186 (1995 Brightview Care Center, 292 NLRB 352 (1989) ; Beatrice Grocery

Products, Inc., 287 NLRB 302 (1987), enfd. 872 F.2d 1026 (6th Cir. 1989). Relevant to the inquiry are the context in which the statements are made, NLRB v. Eurodrive, Inc., 724 F.2d 556, 559 (6th Cir. 1984) , and the "total conduct" of the person making the comments. Sewell, 138 NLRB at 72.

Applying these principles, we adopt the hearing officer's conclusion that the Petitioner's conduct here did not so lower the standards of campaigning that the uninhibited desires of the employees could not be determined in an election. We find that, even if its evidence were fully credited, the Employer has failed to demonstrate that the Petitioner's conduct amounted to a "sustained inflammatory appeal" or a "systematic attempt to inject religious issues into the campaign.[4] Considering both the context and the Petitioner's total conduct, we find that the Petitioner did not overstress or exacerbate religious prejudice. The comments at issue were made at only one of about 10 union meetings. The Employer offered no evidence that there was any other injection of religious comment into the campaign (through literature or other means) ; thus, religion was neither the core nor the theme of the campaign. Nor did the Employer offer any evidence showing a history of preelection tension.fn5 Any appeal to religious prejudice -- if, indeed, there was such an appeal -- certainly does not appear to have been a deliberate and calculated attempt to so inflame religious prejudice that the employees would vote against the Employer on religious grounds alone. In any event, we find that the Petitioner's remarks would not have the "likely effect" of prevent[ing] or imped[ing]" employees from making a "reasoned choice" in the election. Sewell, 138 NLRB at 70.

In sum, because the Employer failed to demonstrate that the Petitioner, through its preelection conduct, overstressed and exacerbated racial or religious feelings through a deliberate appeal to prejudice, its objection 6 does not provide a basis for setting aside the election.

Objections 7 and 8. The Employer contends that the Petitioner promised to pay legal fees for an immigration attorney (No. 7), and to provide employees with a paid retirement plan, if employees voted for the Petitioner (No. 8) . In recommending that these objections be overruled, the hearing officer credited testimony that immigration assistance was described generally, and that the Petitioner informed employees that the pension plan was not pre-set, but subject to negotiations. The hearing officer thus concluded that the Petitioner made no objectionable specific offers of benefits (as opposed to general propaganda about the benefits of unionization).

In adopting the hearing officer's recommendation, we do not rely on his suggestion that whether the Petitioner's promises are objectionable is tied solely to the specificity of the promises made. Union promises made to induce employees to vote for the union are ordinarily considered part of the give-andtake of campaign propaganda and not legally objectionable Smith Co., 192 NLRB 1098, 1101 (1971); Fleet Boston Pavilion, 333 NLRB No. 79 (2001).The established exception to this rule is where a union promises (or actually grants) a significant benefit within its power to confer (such as the waiver of initiation fees; see Objections 4 and 5, above). See Alyeska Pipeline

Service Co., 261 NLRB 125, 127 (1982). Then, the important inquiry is whether the offer of benefit is conditioned upon preelection support for the union.

Here, the hearing officer found that the Petitioner made no specific promises regarding immigration assistance (and specifically denied paying for immigration attorneys). He also found that the Petitioner clearly stated that pension benefits were to be acquired through negotiation. Neither of the promised benefits was conditioned on employee preelection support or available only to a select group. Cf. Loubella Extendables, Inc., 206 NLRB 183 (1973). In any event, to the extent that the Petitioner was merely promising to extend existing union benefits to new members, such promises are not objectionable. See Dart Container, 277 NLRB 1369 (1985). Objection 10. The Employer contends that the Petitioner coerced employees by polling of unit employees regarding their union sympathies. Again, we find that the hearing officer properly rejected this contention.

A union's noncoercive preelection polling of unit employees does not warrant setting aside an election. J.C. Penney Food Dept., 195 NLRB 921 fn. 4 (1972), enfd. 82 LRRM 2173 (7th Cir. 1972); Springfield Hospital, 281 NLRB 643, 692-693 91986), enfd. 899 F.2d 1305 (2d Cir. 1990.[6] The hearing officer found that, even if he credited the Employer witnesses, the evidence shows only that, at a meeting with employees, Stephenson or another agent asked employee Erazo if he supported the Petitioner. Stephenson discontinued his inquiry as soon as Erazo said that he did not have to disclose his voting preference, and Erazo testified that the atmosphere was friendly. Thus, we agree with the

hearing officer that Stephenson's questioning of Erazo was not coercive and hence was not objectionable.[7]

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters Chauffeurs, Warehousemen, Industrial & Allied Workers of America, Local 166,International Brotherhood Of Teamsters, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Included: Full-time and regular part-time drivers employed by Honeyville Grain, Inc. at or out of 11600 Dayton Drive, Rancho Cucamonga, California.

Excluded: Quality assurance employees, warehouse employees, production employees, maintenance employees, mix room employees, office clerical employees, professional employees, all other employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., February 6, 2004.

Footnotes

fn1 Except as regards the status of Roberto Silva, there were no exceptions to the hearing officer's recommended agency findings. As explained below, we find it unnecessary to decide whether Silva was an agent of the Petitioner. We adopt the other recommendations pro forma.

The Petitioner has excepted to some of the hearing. officer's credibility findings. The Board's established

policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the continued relevant evidence convinces us that they are incorrect. Stretch-Tex Co., 118 NLRB 1359, 1361 (1957). we find no basis for reversing the findings.

fn2 Because the hearing officer discredited testimony that Silva threatened employees, we need not pass on the Employer's argument that Silva was the Petitioner's agent or on the hearing officer's analysis of Silva's conduct under the third-party standard.

fn 3 NLRB v. Savair Mfg. Co., 414 U.S. 270 (1973), is clearly distinguishable. There, the Supreme Court held that the union had interfered with the election by promising to waive initiation fees for any employee who signed a recognition slip, indicating support for the union, before the election. The Court reasoned that such conduct impermissibly "allow[ed] the union to buy endorsements and paint a false portrait of employee support during its election campaign." Id. at 277. As the Board and the courts have recognized, no such opportunity is presented under circumstances such as those that exist here.

Because the hearing officer discredited Employer's witnesses, testimony that employees Silva and Lopez told other employees that they would have to pay fines, it is again unnecessary to address the Employer's contention that Silva was an agent, or to rely on the hearing officer's alternative analyses.

fn4 Because we find that the Employer did not meet its initial burden, we reject its argument that the hearing officer improperly failed to shift the burden of proof to

the Petitioner. It is thus unnecessary to pass on the hearing officer's alternative rationale, i.e., that even had the Employer made out a prima facie case, the Petitioner provided "sufficient context" to its statements.

Chairman Battista and Member Schaumber point out that the statements made here would not be objectionable under either the more elastic standard announced by the Board in Sewell (even if truthful "does not deliberately seek to overstress and exacerbate racial [or religious or ethnic] tensions by irrelevant, inflammatory appeals") or the Sewell standard as rearticulated in Beatrice which is set forth above.

fn5 Some courts have held that, where there is a history of preelection tension, even an isolated reference to race or religion could constitute a sustained inflammatory appeal. NLRB v. HeartShare Human Services of New York, Inc., 1-8 F. 3d 467, 472 (2d Cir. 1997); NLRB v Eurodrive, Inc., 724 F. 2d 558.

fn7 Because we agree with the hearing officer that the circumstances surrounding the questioning were non-coercive, we do not rely on his finding that, even if the inquiry were "slightly intimidating," the conduct was de minimis.

Nos. 04-9577 & 04-9591

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HONEYVILLE GRAIN, INC.,
Petitioner/Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

July 6, 2006, Filed

JUDGES: Before KELLY, HENRY, and MURPHY, Circuit Judges.

ORDER

Honeyville Grain, Inc., filed a motion seeking only rehearing en banc.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is denied.

To the extent Honeyville Grain, Inc.'s petition may read to include a request for panel rehearing, that request is also denied, with Judge Kelly voting to grant panel rehearing.